OPINION OF ADVOCATE GENERAL COSMAS
delivered on 30 January 1996 *

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* Original language: Greek.

Preliminary observations

1. In this case, the Bundesarbeitsgericht has referred to the Court for a preliminary ruling under subparagraphs (a) and (b) of the first paragraph, and under the third paragraph, of Article 177 of the EC Treaty a number of questions regarding the interpretation of Article 22(1) of Council Regulation (EEC) No 1408/71 of 14 June 1971, [1] and the judgment of the Court of 3 June 1992 in *Paletta and Others* [2] (*'Paletta I'*), concerning Article 18(1) to (5) of Council Regulation (EEC) No 574/72 of 21 March 1972, [3] and the compatibility of the latter provision with the principle of proportionality.

2. The present proceedings provide the Court with an opportunity to explain, first of all, what is entailed by the obligation on employers to provide for the immediate payment of necessary benefits for the purposes of Article 22(1) of Regulation No 1408/71. The Court will also be able to examine whether, in addition to the option available to him under Article 18(5) of Regulation No 574/72, an employer may contend that particular circumstances amount to a case of abuse, that is, he may adduce evidence showing — or at least raising a strong presumption — that a medical certificate attesting incapacity for work and the duration of such incapacity has been fraudulently obtained. Thus the issue to be resolved will be whether the only means of contesting the diagnosis made by the doctor of the insurance institution of the worker's place of residence is to have the worker in question examined by a doctor of the employer's own choice. Lastly, the Court will have to consider whether, if no such possibility is available to the employer, Article 18(1) to (5) of Regulation No 574/72 — the provision in dispute — is contrary to the principle of proportionality.

I — *Legislative background*

3. Regulation No 1408/71 concerns the application of social security schemes to employed persons and their families moving within the Community. According to the fifth recital in the preamble to that regulation, the provisions for coordination of national social security legislation fall within the framework of freedom of movement for workers who are nationals of Member States and should, to this end, contribute towards the improvement of their standard of living and conditions of employment, by guaranteeing within the Community, first, equality of treatment for all nationals of Member States under the various national legal

1 — Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971(II), p. 416), as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 amending and updating Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, and also amending and updating Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 1983 L 230, p. 6).

2 — Case C-45/90 [1992] ECR I-3423.

3 — Regulation laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ, English Special Edition 1972(I), p. 159), as amended and updated by Regulation No 2001/83, cited in footnote 1.

systems and, secondly, social security benefits for workers and their dependants regardless of their place of employment or of residence.

4. Article 22 of Regulation No 1408/71 governs *inter alia* the award of benefits in kind or cash benefits in cases where a worker has been staying for a period outside the competent State. Article 22 provides:

'1. An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, and:

(a) whose condition necessitates immediate benefits during a stay in the territory of another Member State ...

shall be entitled:

(i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence in accordance with the provisions of the legislation which it administers, as though he were insured with it ...

(ii) to cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers ...

2. ...'.

5. Article 18(1) to (5) of Regulation No 574/72 fixing the procedure for implementing Regulation No 1408/71, provides:

'Cash benefits in the case of residence in a Member State other than the competent State

1. In order to draw cash benefits under Article 19(1)(b) of the regulation a worker shall, within three days of commencement of the incapacity for work, apply to the institution of the place of residence by submitting a notification of having ceased work or, if the legislation administered by the competent institution or by the institution of the place of residence so provides, a certificate of incapacity for work issued by the doctor treating the worker concerned.

2. Where the doctors treating the worker concerned in the country of residence do not issue certificates of incapacity for work, the worker shall apply directly to the institution of the place of residence within the time-limit fixed by the legislation which it administers.

That institution shall forthwith have the incapacity for work medically confirmed and the certificate referred to in paragraph 1 drawn up. Such a certificate shall state the probable duration of the incapacity and shall be forwarded to the competent institution forthwith.

3. In cases where paragraph 2 does not apply, the institution of the place of residence shall, as soon as possible and in any event within the three days following the date on which the worker applied to it, have the worker medically examined as if he were insured with that institution. The report of the examining doctor shall indicate, in particular, the probable duration of the incapacity for work, and shall be forwarded to the competent institution by the institution of the place of residence within the three days following the date of the examination.

4. The institution of the place of residence shall subsequently carry out any necessary administrative checks or medical examinations of the worker as if he were insured with that institution. As soon as it establishes that the worker is fit to resume work, it shall forthwith notify the worker and the competent institution thereof, stating the date on which the worker's incapacity ceased. Without prejudice to the provisions of paragraph 6, the notification to the worker shall be treated as a decision taken on behalf of the competent institution.

5. In all cases the competent institution shall reserve the right to have the worker examined by a doctor of its own choice.

6. ...'.

6. The salient feature of Article 18 is that, even if the worker obtains a medical certificate attesting incapacity for work from the doctor treating him in his place of residence, the institution of the place of residence must, within three days, have him medically examined and, within the three days following the date of the examination, forward the findings to the competent institution, indicating the probable duration of the incapacity for work. [4] Thus, the crucial certificate is not the one issued by the doctor treating the worker, but the one drawn up by the medical officer

4 — Of course, the German legislation in force provides that, where the employed person is staying outside Germany when incapacity for work commences, he must forthwith inform both his employer and the competent insurance institution of the onset of such incapacity and its probable duration.

of the competent institution of the place of residence. [5]

7. Article 24 of Regulation No 574/72 provides:

'Cash benefits for workers in the case of a stay in a Member State other than the competent State

The provisions of Article 18 of the implementing regulation shall apply by analogy in respect of the drawing of cash benefits under Article 22(1)(a)(ii) of the regulation. However, without prejudice to the requirement to submit a certificate of incapacity for work, a worker who is staying in the territory of a Member State, but not pursuing any professional or trade activity there, shall not be required to submit the notification of having ceased work referred to in Article 18(1) of the implementing regulation.'

8. According to the first sentence of Paragraph 1(1) of the Lohnfortzahlungsgesetz ('the LFZG') of 27 July 1969, [6] where, after the commencement of his employment, an employee is unable to do his job because, through no fault of his own, he is incapable of work on account of illness, he is entitled to the continued payment of his wages for a period of up to six weeks.

9. According to the first sentence of Paragraph 3(1) of the LFZG, a worker is required to notify his employer immediately of incapacity for work and its probable duration, and to send the employer a medical certificate confirming both matters within three working days of the onset of the incapacity.

II — *Facts*

10. Vittorio Paletta, an Italian national, worked in the Federal Republic of Germany from February 1974 until April 1991 as a fitter for Brennet SA, a company by which his wife and two grown-up children were also employed.

5 — See point 1 of the Opinion of Advocate General Mischo in Case 22/86 *Rindone* [1987] ECR 1339, and point 5 of the Opinion of Advocate General Gulmann in *Paletta I*, cited in footnote 2.

6 — German Law on the continued payment of wages (*Bundesgesetzblatt* I, p. 946), last amended by the Law of 20 December 1988 (*Bundesgesetzblatt* I, p. 2477).

11. From 17 July 1989, Mr Paletta was in Italy with his wife and children on leave granted until 12 August 1989. In the course of that holiday, all members of the Paletta family reported sick, Mr Paletta with effect from 7 August 1989, his wife from 27 August 1989, his son from 31 July 1989 and his daughter from 2 August 1989.

12. Mr Paletta sent Brennet's health insurance fund five medical certificates (*attestati di malattia*) drawn up in Italian and issued by the Unità Sanitaria Locale — Regione Calabria ('the USL'). The first certificate, dated 7 August 1989, reached Brennet's insurance fund on 15 August 1989. The certificates stated that Mr Paletta was ill, but made no mention of incapacity for work. Generally speaking, they confirmed that all the family had been ill, the last sickness period terminating on 25 September 1989. The insurance fund forwarded the certificate of 7 August 1989 to Brennet and sent the company regular progress reports on the illnesses reported. On 6 October 1989, Brennet's insurance fund received forms from the USL containing declarations of incapacity for work and requests for payment of cash benefits in respect of such incapacity.

13. Brennet refused to pay the wages for the sickness period as laid down by the LFZG on the ground that it harboured serious doubts regarding Mr Paletta's purported incapacity for work. By way of justification Brennet explained that in previous years, too, Mr Paletta and his family had all reported sick at the same time while staying in their native country, that is, whilst on leave. As the Bundesarbeitsgericht had consistently held, that fact diminished the evidential value of the medical certificates, which meant that each worker had to provide additional evidence of his or her incapacity for work.

14. Mr Paletta and his family brought proceedings against Brennet before the Arbeitsgericht Lörrach, claiming continued payment of their wages for the time they were ill, that is, from 7 August 1989 until 16 September 1989. [7]

15. By order of 31 January 1990, the Arbeitsgericht Lörrach referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Can the principles contained in the judgment of the Third Chamber of the Court of Justice of 12 March 1987 in Case 22/86 *Rindone* regarding the interpretation of Article 18(1) and (5) of Council Regulation (EEC) No 574/72 be applied in whole or in

7 — The sum in question amounted to DM 3 837.60 gross, less DM 2 389.53 net payable by the company's sickness insurance fund.

part to cases in which payment of cash benefits in the event of illness is made by the employer and not by the social security institution, as for example under Paragraph 1 et seq. of the German Lohnfortzahlungsgesetz of 27 July 1969 (BGBl I, p. 946, as amended most recently by the Law of 20 December 1988, BGBl I, p. 2477)?

In particular:

(2) Is the body responsible for continued payment of remuneration in the event of illness under the law of the Federal Republic of Germany in accordance with Paragraph 1 et seq. of the Lohnfortzahlungsgesetz required to base its decision, in fact and in law, concerning the claim for cash benefits on the findings made by the social security institution of the employee's place of residence concerning the commencement and duration of the incapacity for work?

(3) If the answer to Question 1 is in the affirmative, is the answer the same if the employer, who under Paragraph 1 of the LFZG bears responsibility for continued payment of wages, has no way of checking, in fact or in law, the findings concerning the commencement of the incapacity for work other than to call upon the competent sickness insurance fund, which in this case is not primarily liable to pay the benefit, to have the employee examined by a doctor of its own choice (or its medical officer) pursuant to Article 18(5) of Regulation (EEC) No 574/72?'

16. In its judgment in *Paletta I*, [8] the Court answered those questions as follows:

'Article 18(1) to (4) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community is to be interpreted as meaning that the competent institution, even where this is the employer and not a social security institution, is bound in fact and in law by the medical findings made by the institution of the place of residence or temporary residence concerning commencement and duration of the incapacity for work, when it does not have the person concerned examined by a doctor of its choice, as it may do under Article 18(5).'

8 — Cited in footnote 2.

17. Following that ruling, the Arbeitsgericht Lörrach found in favour of the plaintiffs by judgment of 25 August 1992.

18. Brennet appealed against that decision to the Landesarbeitsgericht, maintaining that the ruling given by the Court of Justice could not be interpreted as barring employers from adducing evidence in rebuttal in order to prove that the provisions requiring the continued payment of wages had been abused. Brennet also queried the applicability in that case of Regulation No 1408/71, invoked by the Court of Justice, in so far as Mr Paletta had not been in need of immediate cash benefits. Lastly, Brennet argued that the formal conditions laid down by the Community regulations regarding notification to the employer of incapacity for work had not, in Mr Paletta's case, been complied with, thereby denying the company any opportunity to exercise its right under those regulations to obtain additional verification.

19. By judgment of 23 August 1993, the Landesarbeitsgericht dismissed Brennet's appeal.

20. Brennet applied to the Bundesarbeitsgericht for review on a point of law.

III — *The questions referred for a preliminary ruling*

21. In the course of the last-mentioned proceedings, by order of 27 April 1994, [9] the Bundesarbeitsgericht referred the following questions to the Court for a preliminary ruling:

'(1) In the light of the requirement concerning the grant of immediate benefits, does Regulation (EEC) No 1408/71 cease to apply to the continuation of wage payments by the employer pursuant to Article 22(1) if, under the relevant German legislation, the benefits are not payable until a given period (three weeks) has elapsed since the commencement of the incapacity for work?

(2) Does the Court's interpretation of Article 18(1) to (4) and Article 18(5) of Council Regulation (EEC) No 574/72 of 21 March 1972 in its judgment of 3 June 1992 in Case C-45/90 mean that an employer is barred from adducing evidence of abuse which shows conclusively or with a sufficient degree of probability that incapacity for work did not exist?

9 — OJ 1994 C 275, p. 12.

(3) If Question 2 is answered in the affirmative, is Article 18 of Council Regulation (EEC) No 574/72 of 21 March 1972 contrary to the principle of proportionality (third paragraph of Article 3b of the EC Treaty)?'

IV — *Replies to the questions referred for a preliminary ruling*

A — *Admissibility*

22. According to Mr Paletta, there was no need to seek a preliminary ruling on these questions since, in its judgment in *Paletta I*, [10] the Court had already dealt exhaustively with the legal issues raised. Consequently, in his view, it was for the national court to apply that judgment with regard to its practical implications when deciding on the case before it and it was therefore neither necessary nor appropriate for the Court of Justice to reply to the questions set out in the order for reference. Mr Paletta recognizes, however, both the scope of the national court's discretion in referring to the Court questions concerning the interpretation and validity of provisions of Community law, and the Court's competence to answer such questions.

23. As regards the need to make a reference to the Court of Justice, according to established case-law [11] it is for the national court to decide whether it is sufficiently enlightened by the preliminary ruling given or whether it is necessary to make a further reference to the Court.

24. In view of that case-law, it is my opinion that it was for the Bundesarbeitsgericht to decide whether it was sufficiently enlightened by the ruling given in *Paletta I*. The Court should therefore address the substantive issues raised in the questions submitted by the national court.

B — *Substance*

(1) Question 1

The concept of cash benefits needed immediately

25. By its first question, the Bundesarbeitsgericht seeks to ascertain to what extent the conditions laid down by Regulation No 1408/71 are satisfied, for the employer to be

10 — Cited in footnote 2.

11 — See Case 29/68 *Milch-, Fett-und Eierkontor* [1969] ECR 165, para. 3; also, Case 283/81 *CILFIT and Others* [1982] ECR 3415, para. 10.

under an obligation to continue paying wages when a worker is ill.

26. Since, under the applicable German legislation, wages — the 'cash benefits' for the purposes of Article 22(1)(a)(ii) of Regulation No 1408/71 — are paid on the last day of the month, the Bundesarbeitsgericht considers that there has been a failure to fulfil, wholly or in part, the precondition for the application of the regulation, namely the need for the immediate grant of benefits.

27. Brennet argues that Regulation No 1408/71 was deliberately designed to apply only in cases of urgency. In other words, Brennet maintains that, in the case of a stay in a Member State other than the State of residence, the institution of the latter State remains responsible for the payment of sickness benefits, and the institution of the place of stay need only intervene to provide assistance where the situation is urgent. It is evident from the tenor of the material provisions that the rules governing the scope of Regulation No 1408/71 must be narrowly construed, so as to apply solely to cases where it is absolutely necessary to pay benefits within a few days. In Brennet's view, those provisions could not possibly be intended to apply, in accordance with the complex procedure laid down by Community law, to cases where more than three weeks elapse between the onset of the illness and the date when benefits are payable. In the light of those considerations, Brennet points out that the benefits claimed by Mr Paletta were not payable under German legislation until 31 August 1989, that is, 24 days after the illness commenced (7 August 1989).

28. I do not find that argument convincing. There is nothing to support the restrictive interpretation suggested by Brennet in either the wording of the relevant provisions of Regulation No 1408/71 or the objectives which that regulation pursues.

29. Under Community law as it now stands, a worker who falls ill is entitled to cash benefits which, as the Court [12] has explained, 'are essentially those designed to compensate for a worker's loss of earnings through illness' and thus to ensure that he continues to enjoy a normal standard of living. [13] The need to receive benefit is immediate because, by reason of his illness and subsequent incapacity for work, the employee's entitlement to wages lapses, to be replaced by his right to receive cash benefits. Also, as the Commission points out, if Brennet's argument were accepted, it would lead to the absurd situation where a worker who falls ill would be entitled to be paid wages only if he were lucky enough to fall ill on or around the date when his wages were payable.

12 — See Case 61/65 *Vaassen-Göbbels* [1966] ECR 261.

13 — In the Court's view, 'the continued payment of wages to an employee in the event of illness falls within the concept of "pay" within the meaning of Article 119 of the Treaty' and the employer's obligation to pay the employee's wages arises from the employment relationship; see Case 171/88 *Rinner-Kühn* [1989] ECR 2743, para. 7.

30. Accordingly, no importance should be attached to the date on which, if he were not sick, the employee would be entitled under the legislation of the Member State concerned to payment of his wages. Otherwise, if Article 22 of Regulation No 1408/71 were narrowly construed, the protection which the Community legislature sought to guarantee workers by means of the relevant provisions of that regulation would be undermined.

(2) Question 2

31. This question raises once again, in compelling terms, the issue of the evidential value of medical certificates attesting to incapacity for work issued by a Member State and of whether the employer concerned may adduce evidence of abuse.

(a) The evidential value of medical certificates

(i) The problem

32. Referring to its own case-law and the relevant national legislation, the Bundesarbeitsgericht notes with regard to evidence of incapacity for work in the form of a medical certificate that such a certificate in principle enables a worker to show that the conditions for the continued payment of his wages under Paragraph 1(1) of the LFZG are satisfied. However, it is open to the employer, in 'cases of abuse', to cast doubt on the existence of the incapacity for work attested by the medical certificate. To that end, he may adduce evidence showing that there is no such incapacity or, at any rate, justifying the existence of serious doubts in that regard. It is then for the worker to provide additional evidence of his purported incapacity for work.

33. Thus — to take one of the examples given by the Bundesarbeitsgericht in the order for reference — the employer may adduce evidence of circumstances which in his view show that the doctor treating the worker issued the certificate on the basis of an erroneous assessment as to the incapacity for work, or that the certificate was obtained through fraud on the part of the worker concerned, or even that the worker's recurrent pattern of behaviour had led to suspicions of abuse.

34. In the belief that the Court of Justice has not yet indicated whether employers are precluded from adducing evidence of abuse, the Bundesarbeitsgericht raises the issue of the evidential value of medical certificates. It asks, therefore, whether the national court is unconditionally bound, whatever its own inclination, by the findings of fact set out in the certificate, and the plea of abuse accordingly barred, or whether, on the contrary, no such bar exists.

35. For its part, the Commission takes the view that it is only in exceptional circumstances — that is, where the certificate attesting incapacity for work is manifestly inaccurate or the worker concerned has resorted to fraudulent conduct — that evidence of abuse may be adduced against him. On the other hand, both the German Government and Brennet argue that to confine a plea of abuse to such exceptional circumstances would be too restrictive. They maintain that, if serious doubts have arisen, that in itself undermines the evidential value of a certificate of incapacity for work.

36. According to the Bundesarbeitsgericht and the German Government, to allow a plea of abuse in circumstances of the kind described in the order for reference is not inconsistent with the objectives pursued by the Community regulations. On the contrary, to exclude evidence of abuse would lead to unequal treatment of workers, since a worker who fell ill during a stay abroad would be in a more favourable position in that his medical certificate would be accorded higher evidential value than a certificate issued by the corresponding German authorities. Therein lies the source of the Bundesarbeitsgericht's misgivings, given that the objective of Regulation No 1408/71 is to guarantee equal treatment for all nationals of Member States under the various national legal systems and social security benefits for workers and their dependants regardless of their place of employment or residence.

(ii) The relevant case-law

37. In its judgment in *Rindone*, [14] the Court laid down certain fundamental principles [15] in relation to the evidential value of medical certificates. Specifically, the Court stated that cooperation between the institutions of the Member States must be based on good faith and mutual trust [16] and that the authorities in the Member States must recognize the accuracy of declarations made by the authorities of other Member States and issued in accordance with provisions of Community law. The evidential value of the certificates issued in accordance with Article 18 of Regulation No 574/72 rests on precisely those principles and can only be called in question if the employer exercises the option available to him under Article 18(5).

38. The Court has specifically rejected the view that the certificate issued by the institution of the place of residence (or of stay) amounts to no more than an expert's opinion to be evaluated by the competent institution. It has accordingly ruled that 'Article 18(1) to (4) of Regulation No 574/72 must be interpreted as meaning that if the competent

14 — Cited in footnote 5; the case essentially concerned the determination of the onset and the duration of incapacity for work on the part of a worker in the Federal Republic of Germany, and the related cash benefits to which he was entitled under Article 18 of Regulation No 574/72.

15 — As Advocate General Gulmann noted in point 12 of his Opinion in *Paletta I*, cited in footnote 2.

16 — That is the express effect of Article 84(2) of Regulation No 1408/71 in conjunction with Article 5 of the Treaty.

institution does not exercise the option provided for in paragraph (5) of having the person concerned examined by a doctor of its choice, it is bound, in fact and in law, by the findings made by the institutions of the place of residence as regards the commencement and duration of the incapacity for work'. [17] In its judgment in *Paletta I*, the Court considered [18] that, in cases where the employer is the competent institution responsible for the payment of benefits, he is bound by the certificates in question if he has not had the person concerned examined by a doctor of his choice, as he may do under Article 18(5).

39. In its judgment in *Rindone*, the Court added that 'that interpretation is also made necessary by the purpose of Article 18 of Regulation No 574/72 and of Article 19 of Regulation No 1408/71; if the competent institution was free not to recognize the finding of incapacity for work made by the institution of the place of residence, a worker who in the meantime had once again become unfit for work could ... have difficulty in producing the necessary proof; however, it is precisely those difficulties which the Community rules at issue are designed to eliminate; such a situation would be unacceptable because it would interfere with "the establishment of the greatest possible freedom of movement for migrant workers, which is one of the foundations of the Community"'. [19]

40. A few days after the ruling in *Paletta I*, in its judgment of 19 June 1992 in *V* v *Parliament*, [20] the Court interpreted Article 59 of the Staff Regulations for Officials of the European Communities ('the Staff Regulations') by reference to the principle laid down in *Rindone* and *Paletta I* concerning the evidential value of medical certificates. [21] The Court pointed out [22] that Article 59 of the Staff Regulations 'does not empower the administration to refuse to take account of a medical certificate, even though it does not mention the medical reasons for the incapacity for work of the employee concerned, but it does empower the administration to have the employee examined by a doctor of its choice; it must therefore be held that the refusal of the Parliament's administration to accept the medical certificate ... without availing itself of its power to require Mrs V. to undergo a medical examination is contrary to Article 59 of the Staff Regulations'. [23]

41. It follows from those decisions that a medical certificate raises, in favour of the person relying on it, a presumption that the facts attested therein are accurate and that it was issued in accordance with the proper

17 — Para. 15 of the judgment in *Rindone*, cited in footnote 5. See also Case 28/85 *Deghillage* [1986] ECR 991, paras 17 and 18.

18 — Para. 28 of the judgment, cited in footnote 2.

19 — Para. 13 of the judgment in *Rindone*, cited in footnote 5. See also paras 3 and 4 of the Opinion of Advocate General Mischo in the same case. See, to the same effect, Case 284/84 *Spruyt* [1986] ECR 685, para. 18, and para. 24 of the judgment in *Paletta I*, cited in footnote 2.

20 — Case C-18/91 P [1992] ECR I-3997: the case concerned an appeal against a judgment of the Court of First Instance dismissing the application brought by Ms V, appellant and former member of the temporary staff of the European Parliament, for annulment of the report submitted by the Medical Committee responsible for examining her case, and of a number of decisions by which the European Parliament had refused *inter alia* to accept a medical certificate submitted by Ms V attesting her need to cease work.

21 — Para. 32.

22 — Para. 33.

23 — See also Case 271/87 *Fedeli* v *Parliament* [1989] ECR 993.

procedure. [24] However, that presumption may be rebutted if the employer exercises his right to request that the worker be examined by a doctor of his choice.

42. Consequently, the only possible interpretation of the judgments in *Rindone* and *Paletta I* is that the rules laid down by Article 18 do not concern solely the steps to be taken by workers who have fallen ill in a Member State other than the competent State in order to prove incapacity for work, but also the evidential value which the competent institution must attribute to a certificate issued by the institution of the place of residence. [25]

43. The Commission argues that, where the employer is the institution responsible for the payment of cash benefits, the option available to him under Article 18(5) of Regulation No 574/72 cannot be usefully exercised in due time, since it is difficult for the institution of the place of stay to determine which is the competent German institution.

44. In *Paletta I*, the Court stated [26] that the difficulties faced by employers in making proper use of the option provided for under Article 18(5) 'cannot call in question the interpretation of one of the provisions of [the] regulation, as it follows from its wording and purpose; moreover, such practical problems can be resolved by the adoption of national or Community measures to improve the information available to employers and to facilitate recourse to the procedure laid down in Article 18(5) of Regulation No 574/72'.

45. As regards the practical difficulties involved in exercising the right conferred on employers by Article 18 of Regulation No 574/72, Advocates General Mischo [27] and Gulmann [28] thought that these might be overcome either by amending that provision, or by referring the difficulties to the Administrative Commission on Social Security for Migrant Workers provided for in Articles 80 and 81 of Regulation No 1408/71, in the context of the specific cooperation procedures laid down in particular by Article 84 of Regulation No 1408/71, or even through measures adopted unilaterally by the Member State. [29]

24 — Emphasized by the Court in para. 34 of its judgment in *V* v *Parliament*, cited in footnote 20.

25 — A point emphasized by Advocate General Gulmann in point 6 of his Opinion in *Paletta I*, cited in footnote 2.

26 — Para. 27 of the judgment, cited in footnote 2. See also Case C-228/88 *Bronzino* [1990] ECR I-531, para. 14, and Case C-236/88 *Commission* v *France* [1990] ECR I-3163, para. 17.

27 — See points 22 to 26 of his Opinion in *Paletta I*, cited in footnote 2.

28 — See points 8 and 12 of his Opinion in *Paletta I*, cited in footnote 2.

29 — Those remarks notwithstanding, no Community measure has been adopted since then in order to resolve the problem and no developments are foreseeable in the near future. As not only the Commission (para. 29 of its observations), but also the Council, pointed out at the hearing, to date only the German legislature has adopted measures to that effect.

(b) The proposed solution

46. I shall now consider how far it is true that the only way an employer can rebut the presumption raised by Article 18 of Regulation No 574/72 is to exercise the option accorded to him of requesting that the worker be examined by a doctor of his choice, or whether the evidential value of the medical certificate may also be undermined merely by proving the existence of circumstances amounting to 'abuse' (the term used by the Bundesarbeitsgericht).

47. In my opinion, the presumption raised by Article 18 of Regulation No 574/72 that a medical certificate issued is valid wholly precludes reliance on circumstances which cast serious doubts on the accuracy of the findings attested by such a certificate.

48. On the other hand, that presumption of validity does not preclude the possibility of adducing evidence which conclusively establishes that a certificate of incapacity for work is vitiated.

49. To be more exact, I believe that the only course of action open to employers, apart from the option available under Article 18(5), is to plead that a medical certificate lacks certain essential characteristics as to form, relating to the worker's person, for it to be valid; in other words, the certificate is so obviously tainted that it cannot be regarded as genuinely relating to the worker producing it. I have in mind cases where the certificate relied upon contains such inaccuracies — for instance, it bears the name and surname or the date of birth of another person or the wrong date — that even the worker producing it cannot claim to derive any rights thereunder.

50. On the other hand, the employer may also go behind the wording of the certificate to produce evidence arising from an act of a public body in the Member State in which the certificate was issued, and establishing — in a manner which is not open to challenge, whether before the courts or through administrative channels — that the findings reported in the certificate do not correspond to the truth.

51. Cases falling into that category are those where, notwithstanding the medical certificate which the employer has accepted in good faith, other circumstances prove conclusively that there was no incapacity for work, since the certificate was fraudulently obtained; in such cases, by virtue of the Roman law principle of *fraus omnia corrumpit*, a worker who seeks to rely on a certificate which he has obtained by fraud is no longer entitled to protection under the

provisions of Community law. [30] That is the position, for example, where the doctor concerned has been penalized following a disciplinary procedure or found guilty in criminal proceedings of having issued the certificate in question unlawfully. [31]

52. It is my belief that, by allowing those circumstances to be adduced in evidence, and thereby enabling the institution responsible for paying cash benefits — in this case, the employer — to establish the existence of circumstances such as those described above, the Court will prevent 'Community law from being applied in a way which [goes] against common sense and [ignores] obvious and undeniable realities'. [32]

53. I also concur with the reasoning of Advocates General Mischo and Gulmann in their Opinions in *Paletta I*. Advocate General Mischo [33] pondered the correct approach to be adopted in cases where there are 'serious and well-founded doubts concerning the incapacity for work established by the institution of the place of residence'. As he pointed out, 'mere doubts cannot suffice for the competent institution not to be bound by the findings of the institution of the place of residence', since it may exercise the option provided for in Article 18(5) of having the worker in question examined by a doctor of its own choice. Advocate General Mischo added that 'the findings of the institution of the place of residence may be called in question by the competent institution (which did not have the examination provided for in paragraph (5) carried out) only if they were obtained as a result of fraudulent conduct which misled the institution of the place of residence, and/or they subsequently proved to be manifestly incorrect'. By way of conclusion, he found it 'very difficult to accept that, where the competent institution has relied on the findings of the institution of the place of residence and had no obvious reason to have the person concerned examined by a doctor of its choice (that examination must after all be the exception under the Article 18 system), it would continue to be bound by those findings even if they turned out without the slightest doubt to be incorrect and to have been obtained by fraud'. [34]

54. Support for the approach explored here is to be found in the case-law. A good example is provided by the Court's treatment of

30 — The Court has not expressly recognized this principle, which was proposed by Advocate General Darmon in point 17 of his Opinion in Case 130/88 *Van de Bijl* [1989] ECR 3039 and by Advocate General Mischo in point 34 of his Opinion in *Paletta I*, cited in footnote 2.

31 — In point 12 at the end of his Opinion in *Paletta I*, cited above in footnote 2, Advocate General Gulmann stated that 'as a matter both of principle and of practicality, there are good reasons for having such a review of the correctness of certificates carried out by the courts of the country whose institutions issued the certificates and where the factual circumstances to which the certificates refer took place'.

32 — See point 34 of Advocate General Mischo's Opinion in *Paletta I*, cited in footnote 2.

33 — See point 27 et seq. of his Opinion in *Paletta I*, cited in footnote 2.

34 — Point 29 of Advocate General Mischo's Opinion in *Paletta I*, cited in footnote 2.

an analogous problem in *Van de Bijl*, [35] concerning a certification system which in certain respects resembles that provided for in Article 18 of Regulation No 574/72. In *Van de Bijl*, one of the questions addressed was whether the host State was bound to grant the authorization necessary for exercising on its territory the trade of a self-employed house painter on the strength of a certificate issued in the State from which the individual concerned had come, [36] even where that certificate contained manifest inaccuracies or errors with regard to the length of time in which he was actually engaged in that professional activity in the latter State. In its judgment, the Court emphasized that 'the host Member State ... is therefore, in principle, bound by the declarations contained in the certificate issued by the Member State from which the beneficiary comes, as that certificate would otherwise be deprived of its effectiveness'. [37] The Court went on to state that 'where there are objective factors which lead the host State to consider that the certificate produced contains manifest inaccuracies, that State may, if it so wishes, approach the Member State from which the beneficiary comes with a view to requesting additional information.' [38] In other words, although the relevant legislation [39] did not make express provision for it, the Court recognized that, in certain wholly exceptional cases, the host State is not bound by the certificate issued by the competent authority in the Member State from which the beneficiary has come. Specifically, the Court considered that 'in those circumstances, the host Member State cannot be obliged to overlook matters which occurred within its own territory and which are of direct relevance to the real and genuine character of the period of professional activity completed in the Member State from which the beneficiary comes'. [40] The Court concluded by pointing out that 'the competent authority in the host Member State ... is not bound to grant the application automatically if the certificate produced contains a manifest inaccuracy inasmuch as it states that the person covered by the directive has completed a period of professional activity in the Member State from which he comes, when it is clear that during that same period the person in question has pursued his activities in the territory of the host Member State'. [41]

55. Furthermore, in its judgment in *Lair*, [42] the Court clearly ruled that abuses established on the basis of 'objective evidence',

35 — Paragraph 26 of the judgment, cited in footnote 30.

36 — That authorization had been applied for under the relevant provisions of Council Directive 64/427/EEC of 7 July 1964 laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in manufacturing and processing industries falling within ISIC Major Groups 23 to 40 (Industry and small craft industries) (OJ, English Special Edition 1963-64, p. 148).

37 — Para. 22.

38 — Para. 24.

39 — Namely Directive 64/427, cited in footnote 36.

40 — Para. 26.

41 — Para. 27.

42 — Case 39/86 [1988] ECR 3161, para. 43: in that case, the Court initially emphasized that Community law does not authorize Member States to make the award of assistance for university studies contingent on the prior completion of a minimum period of professional activity on their territory. Subsequently, however, accepting the argument adduced by the Member States which had submitted observations in order 'to prevent certain abuses, for example where it may be established on the basis of objective evidence that a worker has entered a Member State for the sole purpose of enjoying, after a very short period of occupational activity, the benefit of the student assistance system in that State', the Court stated that 'such abuses are not covered by the Community provisions in question'.
Moreover, the Court has repeatedly held in the past that Community law cannot be relied on in cases of abuse of that type. With regard to freedom of movement for persons, see for example Case 33/74 *Van Binsbergen* [1974] ECR 1299, para. 13, and Case 115/78 *Knoors* [1979] ECR 399, para. 25, and with regard to the free movement of goods, Case 229/83 *Leclerc and Others* [1985] ECR 1, para. 27.

'are not covered by the Community provisions in question'. [43]

56. Consequently, I take the view that employers cannot rebut the presumption that certificates of incapacity for work produced by employees are lawful by adducing evidence of circumstances which, although indicative of a probable case of abuse, do not conclusively support such an inference.

57. The Bundesarbeitsgericht, the German Government and Brennet, relying on German procedural rules relating to the evidential value of medical certificates, state that, if workers are to be accorded equal treatment, the same evidential value must be attributed to such certificates irrespective of the place where a worker falls sick — under German law, the court hearing the case would be free to assess those certificates as it sees fit — whether they are issued on the territory of the Member State responsible for paying the benefits or by the competent authorities of another Member State.

58. At the hearing, the agent for the German Government argued that if certificates issued by authorities abroad had a higher evidential value than those issued by the German authorities, foreign certificates could only be verified by means of criminal proceedings and, in exceptional cases, by proceedings before the labour courts. However, that would mean interfering with the national rules of procedure in a way that is not necessary to ensure the exercise of the fundamental freedoms enshrined in Community law. In any case, it is for the national court to evaluate both the certificate proffered and any objections on the part of the employer, on the basis of the national rules of procedure by which it is bound.

59. The Commission reaches the same conclusions (paragraph 44 of its observations), namely that Article 22(1)(ii) of Regulation No 1408/71 provides that the right to be paid cash benefits by the competent institution is governed by the legislation which that institution administers. According to the Commission, the reference there is not just to the substantive law of the competent State, but also to its procedural law, including its rules on the evaluation of evidence. Article 18 of the implementing regulation, No 574/72, makes provision only for those steps in the procedure which of necessity

43 — Advocate General Mischo also referred to that case in point 32 of his Opinion in *Paletta I*, cited in footnote 2. See also the Opinion of Advocate General Darmon in the *Daily Mail* case (Case 81/87 [1988] ECR 5483), in which he proposed that the Court recognize that the transfer of the central management of a company to another Member State may constitute one way of exercising freedom of establishment, subject always to the jurisdiction of the national courts to assess whether, 'in a specific case and having regard to the circumstances, there is a suggestion of abuse of a right or circumvention of the law and whether it should decide not to apply Community law' (point 9). However, the Court adopted a different interpretation of the freedom of establishment and did not rule on that question.
See also, to the same effect, the judgment and Advocate General Darmon's Opinion in Case C-8/92 *General Milk Products* [1993] ECR I-779, para. 22, in which the Court ruled that, in order to refuse payment of compensatory monetary amounts in respect of certain goods imported into, or exported from, Germany, it was necessary to show that the import or export transactions were effected solely for the purpose of wrongfully securing an advantage under the Community rules, and that it was for the national court to decide whether that was the case.

take place in the State where the worker concerned has been staying. In conclusion, therefore, the Commission maintains that such an interpretation must not cause the objective pursued by Article 18 to be distorted by applying the procedural rules of the competent State.

60. If those views and the approach consistently adopted by the Bundesarbeitsgericht were to be wholly endorsed — with respect also to the right to produce evidence of circumstances which arouse strong suspicions, but do not conclusively prove that the findings attested in a medical certificate are false — the primacy of Community law over national law would be jeopardized. [44]

61. Recognition of 'cases of abuse' in this context cannot be regulated in the same way as areas which are not covered by Community law, since it entails a substantial amendment of the Community rules governing the evidential value of medical certificates. If employers are permitted to plead the existence of an abuse, in the sense intended by the Bundesarbeitsgericht, the effectiveness of the rules laid down in Regulations Nos 1408/71 and 574/72 [45] may be compromised and the attainment of their underlying purpose thwarted.

62. In conclusion, I take the view that Article 18(1) to (5) of Regulation No 574/72, as interpreted in *Paletta I*, means that the institution responsible for the payment of benefits, in this case the employer, is not barred by that provision from adducing evidence which conclusively demonstrates, in the sense described above, that there was no incapacity for work.

(3) Question 3

The compatibility of the provisions at issue with the principle of proportionality

63. That said in reply to Question 2, I now turn to the third question, which concerns

44 — See the objections raised in relation to a similar problem — namely whether it is possible to put forward as a defence a plea in law alleging abuse, under certain provisions of substantive law — by Advocate General Tesauro in point 26 et seq. of his Opinion in Case C-441/93 *Pafitis and Others* [1996] ECR I-1349.

45 — See to that effect, on similar matters, the judgments in Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, para. 30 et seq., in particular para. 33, and Case C-290/91 *Peter* [1993] ECR I-2981, para. 8. See also point 20 et seq. of the Opinion of Advocate General Jacobs in *Peter*, points 38 and 39 of Advocate General Van Gerven's Opinion in Case C-371/92 *Ellinika Dimitriaka* [1994] ECR I-2391, and point 61 of my Opinion in Case C-63/93 *Fintan Duff and Others* [1996] ECR I-572.

the compatibility of the provisions at issue with the principle of proportionality. [46]

64. The Court has consistently regarded the principle of proportionality as a general principle of Community law with which the Community institutions must comply when exercising their powers. Specifically, it is clear from the case-law [47] that the general principle of proportionality, which is a superior rule of law, requires the objectives pursued by the Community, which serve the general interest, and measures affecting the rights of individuals to be brought into balance with one another. In other words, the means employed must be necessary and appropriate in terms of the aim to be achieved and any disadvantages entailed must not outweigh the advantages gained, that is, such disadvantages must not constitute, in the light of the objective pursued, an interference which is disproportionate and unacceptable, and liable materially to impair the rights in question.

65. The objective pursued, not only by Article 18 of Regulation No 574/72, in the light of its wording, but also by Regulation No 1408/71, [48] is to protect employees who fall ill while staying on the territory of another Member State and who are thereby entitled to the immediate payment of cash benefits. Specifically, the provisions in question buttress the employee's right to receive cash benefits in accordance with Article 22 of Regulation No 1408/71, after first following the procedure laid down in Regulation No 574/72 and obtaining from the competent institution of the place of stay a medical certificate attesting to his incapacity for work.

66. Furthermore, in *Rindone*, the Court ruled that 'if the competent institution was free not to recognize the finding of incapacity for work made by the institution in the place of residence, a worker who in the meantime had once again become fit for work could ... have difficulty in producing the necessary proof'. [49] In *Paletta I*, the Court stated that the practical difficulties involved in arranging for the worker concerned to be examined by a doctor of the employer's choice 'cannot call in question the interpretation of one of the provisions of [Regulation No 574/72], as it follows from its wording and purpose'. [50]

46 — The factual circumstances material to this case arose in 1989, namely before the entry into force of the Treaty on European Union. Contrary to the view apparently taken by the Bundesarbeitsgericht, there is therefore no need to consider the question whether, like the Treaty provision cited above, that principle was expressed in the form of a written rule of general application.

47 — See, for example, Joined Cases 279/84, 280/84, 285/84 and 286/84 *Rau and Others* v *Commission* [1987] ECR 1069, para. 34, Case 265/87 *Schräder* [1989] ECR 2237, para. 21, and Case 5/88 *Wachauf* [1989] ECR 2609, para. 18. See also Case C-36/94 *Siesse* [1995] ECR I-3573, para. 21, and Case C-426/93 *Germany* v *Council* [1995] ECR I-3723, para. 42.

48 — As Advocate General Mischo pointed out in point 6 of his Opinion in *Rindone*, cited in footnote 5, 'Regulation No 574/72 is not an implementing regulation adopted by the Commission on the basis of an enabling clause contained in a Council regulation; it is, on the contrary, a measure adopted by the Council itself on the basis of the same provisions of the Treaty and according to the same procedures (opinion of the Parliament and of the Economic and Social Committee) as Regulation No 1408/71'. He added that 'even if certain provisions of Regulation No 574/72 constituted more than implementing measures, ... they would none the less have been validly adopted'.

49 — See *Rindone*, cited in footnote 5, para. 13.

50 — Para. 27 of *Paletta I*, cited in footnote 2.

67. In accordance with the analysis set out above with regard to Question 2, and consistently with the case-law cited, I believe that the means employed — the presumption that a medical certificate is valid, with all that it entails — is appropriate and necessary to attain the objective pursued, namely the protection of employees who have become incapacitated for work while staying in a Member State other than the competent State. At the same time, it guarantees the exercise of a fundamental right, namely freedom of movement for workers moving within the Community. [51]

68. In my view, by laying down the rule in Article 18(5) of Regulation No 574/72 — which, as noted in my answer to Question 2, may be gainsaid by evidence which shows conclusively, in a manner which is not open to challenge either before the courts or through other administrative channels, that there was no incapacity for work — the Community legislature has not impaired the rights of the employer, since, subject to certain conditions, he is still free to rebut the presumption of incapacity for work raised by the certificate produced. Consequently, the disadvantages, namely the fact that the employer cannot call in question the evidential value of the medical certificate unless he proves that there was no such incapacity, do not outweigh the advantages and do not constitute, in the light of the objective pursued, an excessive and unacceptable interference, which would materially impair the employer's rights. There is therefore a reasonable balance between the advantages and the disadvantages, which means that Article 18 of Regulation No 574/72 is not contrary to the principle of proportionality.

69. Thus, rather than take the extreme view that Article 18 of Regulation No 574/72 is invalid because it conflicts with a superior rule of Community law, in this case the principle of proportionality, the better approach, given the right to adduce evidence of exceptional circumstances conclusively showing that there was no incapacity for work as attested by the certificate, is to interpret the provision in dispute in a manner consistent with that principle.

70. I now turn to the possibility of the Court answering Question 2 in the negative, to the effect that, if an employer fails to exercise the option open to him under Article 18(5) of having the worker concerned examined by a doctor of his choice, he has no further possibility of adducing evidence that there was no incapacity for work. In other words, the Court may take the view that in those circumstances the employer is even barred from adducing evidence which shows conclusively that a medical certificate lacks certain characteristics as to form for it to have been validly issued or, by going behind the wording of the certificate, evidence disclosing in a manner which cannot be contested before the courts or through other administrative channels that the facts attested do not correspond to the truth. In my opinion, such an interpretation would invalidate

51 — See the judgments in *Rindone*, para. 13, *Spruyt*, para. 18, and *Paletta I*, para. 24 (cited in footnotes 5, 19 and 2, respectively).

the provision in dispute, namely Article 18 of Regulation No 574/72, because that provision would no longer be consonant with the principle of proportionality, in so far as the burden placed on the employer would be disproportionate by comparison with the advantage derived from it by the worker.

71. In those circumstances, I believe that in the context of the continuing endeavour to balance and protect the respective rights of employers and workers, with a view to attaining freedom of movement for workers within the Community, Article 18 of Regulation No 574/72 acts as a safety valve. It may be inadequate and in need of further refinement and updating, but that does not mean that it should be regarded as any less valid since it nevertheless brings into balance with a modest measure of success the conflicting interests of employers and workers.

72. Accordingly, on the basis of the answer which I propose be given to the second question, I consider that Article 18(1) to (5) of Regulation No 574/72 is not contrary to the principle of proportionality.

Conclusion

73. On those grounds, I propose that the Court reply as follows to the questions referred by the Bundesarbeitsgericht for a preliminary ruling:

(1) Article 22(1) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and members of their family moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, is to be interpreted as meaning that Regulation No 1408/71 applies even where, in accordance with the applicable national legislation, cash benefits are not payable until a certain period of time (three weeks) has elapsed since the onset of the incapacity for work.

(2) Article 18(1) to (5) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 is to be interpreted as not precluding the institution responsible for paying the benefits, in this case the employer, from adducing evidence of the

existence of circumstances which establish conclusively that there was no incapacity for work.

(3) On that construction, Article 18(1) to (5) of Regulation No 574/72 is not contrary to the principle of proportionality.